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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION
(a corporation),
Petitioner,

vs.

EL DORADO TERMINAL COMPANY
(a corporation),
Respondent.

BRIEF FOR RESPONDENT.

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Subject Index

Table of Authorities Cited

Codes and Statutes

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RESPONDENT'S STATEMENT OF THE CASE.

Although petitioner in its "Statement of the Case" announced that a single issue of federal law arising under the Elkins Act is involved in this cause, that question and petitioner's contractual obligation to respondent are lost sight of in the general discussion in petitioner's brief of many other more or less academic matters. We think it proper, therefore, to restate the facts of the case which are not controverted, but which in the main were covered by stipulation.

In conformance with the brief for the petitioner we shall refer to the El Dorado Oil Works and respondent El Dorado Terminal Company, its wholly owned subsidiary, as the "El Dorado Company" and the petitioner will be referred to as the "Car Corporation".

On September 28, 1933, the El Dorado Company, a California corporation, was engaged in the manufacture of coconut oil at its plant located in the City of Berkeley on San Francisco Bay. The car corporation was engaged in the business of manufacturing, selling and renting tank cars and other types of cars. The coconut oil of the El Dorado Company was shipped in tank cars. The railroads operating out of the San Francisco Bay area did not have tank cars sufficient in number or adequately equipped with the necessary heating coils to meet the requirements of the El Dorado Company and other manufacturers of vegetable oils; nor did they undertake to furnish such cars. In fact their published tariffs provided that carriers did not obligate themselves to furnish tank cars. (R. 163, 201.) Therefore, and to assure to itself a supply of tank cars of proper size and equipped with necessary heating coils for the purpose of its business, the El Dorado Company entered into a written agreement with the car corporation dated September 28, 1933. (R. 20-28.) Under the terms of this contract the car corporation leased to the El Dorado Company fifty tank cars of the agreed capacity and equipment at a monthly rental, and also agreed to furnish to the oil company such additional tank cars as required by the oil company in its business, at an agreed monthly

rental. The El Dorado Company agreed to pay such rentals monthly in advance. In consideration of these payments the car corporation agreed that the El Dorado Company should have the possession and exclusive use of the tank cars for the agreed period of three years and also agreed to collect from the railroad carriers over whose lines the cars moved the compensation or allowance provided to be paid in the published rules and tariffs of the carriers as compensation for the furnishing of such cars. For many years prior to the date of the agreement and thereafter continuously for the period for which recovery is sought in this action, the published railroad tariffs applicable to all interstate carriers provided a fixed rate for the movement of such tank cars from the oil company's plant on San Francisco Bay to various points in the middle west and eastern states to which the oil company's products were shipped; and those tariffs also provided for the payment of mileage at the rate of 1½¢ per mile for the use of tank cars of private ownership, such payments to be made "to the car owner or to the party who has acquired the car or cars according to the assigned reporting marks published in the official railway equipment register". The oil company fully performed its obligations under the said contract of lease and the car corporation so performed until June, 1934. From the effective date of the contract, January 1, 1934, until June of that year, the car corporation regularly collected the mileage allowances from the railroad carriers for the credit of the El Dorado Company and paid over the sum so collected to the oil company. On July 2, 1934, the

Interstate Commerce Commission released its order entitled "Investigation and Suspension Docket No. 3887, Use of Privately Owned Refrigerator Cars". Thereafter the car corporation refused to make further payments to the El Dorado Company of the amount so collected in excess of the amount becoming due monthly for the agreed car rentals, notwithstanding that it continued to collect the mileage allowances in full from the carriers.

The present action was instituted to collect the moneys so withheld for the period from April, 1934, to and including April, 1935. It was stipulated that the amount so collected and withheld by the car corporation for said period was $18,532.78. In its answer to the complaint of the oil company the car corporation admitted the making of the contract and attached a copy thereof to its answer and marked the same Exhibit "A". It also admitted the collection and retention of the said mileage allowances but denied liability therefor *solely upon the ground that the payment of the mileage in excess of the car hire or rental reserved in the agreement was expressly prohibited and enjoined by the provisions of the Elkins Act,* and that if the car corporation were to make such payments in excess of the car hire or rental reserved in the said agreement the said payments would be unlawful in that the El Dorado Company would secure transportation of property at rates less than the rates named in the published and filed tariffs of the common carriers, and that thereby the oil company would obtain a rebate or concession and advan-

tage or discrimination in violation of the provisions of the said Elkins Act. The car corporation did not in its answer question the validity of the agreement. Nor was it claimed or even intimated that the agreement was a device or cloak for any secret agreement or that it was anything but what it purported to be—a legitimate contract made in the ordinary course of business. On the foregoing statement the only issue in the case, and the only question before the Circuit Court of Appeals and the District Court was as to whether the provisions of the Elkins Act prohibit the payment by the car corporation to the El Dorado Company in accordance with their agreement of the mileage allowances received by the car corporation from the railroad carriers under the terms of the published and approved tariffs.

The District Court sustained this defense without filing an opinion. The Circuit Court of Appeals held that the El Dorado Company was entitled under the terms of the car lease agreement to $18,532.78, which the car corporation had collected from the rail carriers and improperly retained to itself in violation of its agreement. It also held that the provisions of the Elkins Act relied upon by the car corporation did not prohibit or prevent the car corporation from paying to the El Dorado Company, as provided in the agreement, the moneys so received and retained.

While petitioner asks this Court to reverse the judgment of the Circuit Court of Appeals, it does not challenge the correctness of the conclusions of the Circuit Court except as to the intent, as distinguished

from the language, of the Elkins Act. In the main the petitioner's brief is devoted to a criticism of various statements of the judges of the Circuit Court, mostly on immaterial matters, made in the course of their opinions. The Circuit Court of Appeals might properly have reversed the judgment of the District Court on the fact, disclosed by the language of the Act itself and which is undeniable, that the Elkins Act pleaded as petitioner's only defense does not in terms prohibit payment to the El Dorado Company by the car corporation of the car mileage received by it for the use of tank cars held under lease by the El Dorado Company. But Circuit Judges Denman and Mathews both filed opinions holding that the requirements of the Interstate Commerce Act had been fully complied with, that the moneys received by the car corporation were legally so paid in accordance with the applicable filed and published tariffs and that the car corporation was not prohibited by the Elkins Act from paying said sums to the El Dorado Company as provided in the agreement of the parties. (R. pp. 305, 329, 339.) Judge Denman, *ex industria*, traced the history of the Interstate Commerce Act and amendatory legislation, including the Elkins Act. He held that the tariff rates and allowances of interstate carriers as shown by the filed and published tariffs are binding upon all parties concerned in the transportation and may not be departed from by carriers; also that the Courts could not order reduction or change in those tariffs because the fixing of rates was a function of the Interstate Commerce Commission

alone. We mention this matter at this time because the briefs supporting the petition for the writ of certiorari urged without any warrant whatever that the Circuit Court had assumed to fix rates in disregard of the fact that the Interstate Commerce Commission is charged with that duty. We believe that the judgment of the Circuit Court of Appeals was wholly correct on the law and the stipulated facts.

While petitioner's excuse, as pleaded, for refusing to pay to El Dorado Company the sums payable under the contract of the parties, was that such payment was expressly prohibited by the language of the Elkins Act, this is not the claim advanced in petitioner's brief. Petitioner therein contends that because of extraneous matters, the Elkins Act means more than it says, and must be interpreted to mean that the mileage allowance provided in the published tariffs to be paid to the furnisher of tank cars must be reduced by the carriers to the actual cost of the cars. If this were so it would not change the fact that petitioner, as a condition of its lease of the cars, agreed to pay to respondent the amount received for car mileage and has refused to do so although admitting its receipt of the money. If the carriers lawfully paid the mileage allowances to petitioner, and that is expressly claimed at page 53 of the brief for petitioner, the Circuit Court was clearly correct in its judgment that petitioner should pay the money to respondent as provided in the agreement.

SUMMARY OF ARGUMENT.

1. The provisions of the Elkins Act do not prohibit or enjoin payment by the car corporation of any moneys received from the interstate carriers for the furnishing of the tank cars leased to the El Dorado Company.

2. Payment of the mileage allowances by the car corporation could not be a rebate, concession or discrimination within the prohibition of the Elkins Act because in every instance the railroad carriers received the full rate named in the tariffs published and filed by such carriers, and the carriers paid to the car corporation only mileage allowances provided to be paid in and by said tariff.

3. The mileage allowances so fixed by the tariffs and paid by the carriers were legal and must be accepted as just and reasonable under the law until the Interstate Commerce Commission has held otherwise, or ordered modification thereof.

4. The Interstate Commerce Commission has not so held—on the contrary it has directly approved the payment of such mileage allowances to shippers as well as to car owners.

5. The tariff provisions for mileage allowances are binding upon all carriers in favor of all car furnishers including shippers and do not permit of payments either greater or less than as provided in the tariffs.

ARGUMENT.

1.

THE ELKINS ACT DOES NOT PROHIBIT THE PAYMENT BY THE CAR CORPORATION OF MONEYS RECEIVED FROM INTERSTATE CARRIERS FOR THE FURNISHING OF TANK CARS LEASED TO THE RESPONDENT.

The section of the Elkins Act referred to in petitioner's answer, and upon which its defense was based, has been codified in 49 U. S. C. A., and reads as follows:

(T. 49 U. S. C. A.):

> **Section 41. Liability of corporation carriers and agents; offenses and penalties.**—(1) *Liability of corporation common carriers; offenses; penalties; jurisdiction.* Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less

than $1,000 nor more than $20,000 for each offense; *and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier,** as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the Court. Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and

**We have italicized the portion of the section relied upon by petitioner.*

whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) *Liabilities for acts of agents; departure from published rates.* In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) *Receiving rebates; additional penalty and recovery thereof.* Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by em-

ployee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial Court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any Court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c. 708, Sec. 1, 32 Stat. 847; June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587.)

Under the language of this section the failure of a carrier to file and publish tariffs or rates and charges

as required by other provisions of the Interstate Commerce Act is made a misdemeanor for which the corporation is liable to fine. It is next provided that it shall be unlawful for any person or corporation to offer, grant, accept or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce by a common carrier, whereby such property shall be transported at a rate less than that named in the tariffs published and filed by the carriers or whereby any other advantages are given or discrimination practiced. It is apparent that the purpose of this section was to prohibit rebates, concessions or discriminations in the transportation of property by common carriers which would result in the interstate carrier receiving less than the tariff rate published and filed by the carrier for such transportation. Of necessity such a rebate or concession could only be made if the carrier directly or indirectly participated in the arrangement or understanding. Agreements or relations having nothing to do with transportation do not come within the language or the purpose of the section. The section permits the payment by carriers of compensation in the nature of mileage allowances to the furnishers of cars for railroad use when the tariffs so provide, and contains no prohibition against the payment of such mileage allowances, by a car owner who has collected them, to a car lessee or a shipper under the circumstances of the instant case. The contract involved in the present action was wholly between the car corporation as a manufacturer and owner of tank cars and the oil com-

pany as the manufacturer of vegetable oils whose business required the use of such tank cars. The car corporation had nothing to do with transportation or the use or the routing of the tank cars. Its only relation with the carriers was the collection of the mileage allowance to which it was entitled according to the published tariffs. It was stipulated or shown without conflict that there was no agreement or relation whatsoever between the shipper or the consignees of the cars and the railroad carriers, and there was no evidence nor is it claimed that any carrier was even cognizant of the agreement of September 28, 1933, between the car corporation and the oil company.

It was stipulated at the trial that the carriers over whose lines the leased tank cars moved had filed and published their tariffs as required by the Interstate Commerce Act; also that the full tariff rates therein provided to be paid were so paid on every movement of the tank cars. It was also stipulated that throughout the period covered by the oil company's claim against the car corporation the published tariffs of the carriers contained a rule or provision for the payment of mileage by the carriers for the use of tank cars of private ownership at the rate of 1½¢ per mile (R. 192 et seq.) and that the mileage allowance paid by the carriers to the car corporation and sued for in the present action was exactly that which was provided to be so paid in the tariff provisions. Since, therefore, the carriers had filed and published their tariffs, charges and rates and received the full freight rates to which they were entitled under the

tariff for the transportation of the oil company's tank cars and had paid to the car corporation only the mileage allowances provided to be so paid under the tariffs, and exactly as so provided, there was clearly no transportation in interstate commerce "at a rate less than that provided in the published tariffs", and as before stated the prohibition of this section of the Act was limited to rebates, concessions or discriminations which in effect reduced the rate received by the carrier below that which was named in the tariffs published and filed by such carrier.

It has not been claimed by the car corporation that the agreement sued upon was a device or a cloak to cover any agreement, secret or otherwise, for the payment of any rebate or the granting of any concession or discrimination within the prohibitions of the Act. In the later pages of this brief we shall show that such was not the effect of the agreement.

In the light of the stipulated facts above mentioned the statute itself disposed of the special defense set up by the car corporation and in effect the Circuit Court of Appeals so held.

2.

PAYMENT OF THE MILEAGE ALLOWANCES BY THE CAR CORPORATION TO THE EL DORADO COMPANY COULD NOT BE A REBATE, A CONCESSION OR A DISCRIMINATION WITHIN THE PROHIBITION OF THE ELKINS ACT.

As stated in the preceding section of this brief, the Elkins Act does not in terms prohibit or even refer

to the payment by a corporation, owning tank cars which it had leased, of any part of the allowance received by it according to the published tariff for the furnishing of such cars. Moreover the prohibition of the Act was directed only to concessions incident to transportation in interstate commerce whereby a carrier received less than the rate to which it was entitled under the published tariffs; and the car corporation was not a carrier or concerned with transportation under the rule declared by this Court in *Ellis v. Interstate Commerce Commission,* 237 U. S. 434. Finally there was no rebate, concession or discrimination because the full rate provided in the published tariffs was paid, and the mileage allowance paid to the car corporation by the carriers was only and exactly what was so provided to be paid in the published tariffs.

What the car corporation, *having nothing to do with transportation,* might do with money paid to it for the furnishing of the cars was in no manner covered by the Elkins Act or other provisions of the Interstate Commerce Act. Payment thereof to another would merely reduce its earnings on the money invested in the cars. Such payment would not result in a reduction of the freight payable to the carriers under the published tariffs or affect any person or corporation engaged in transportation.

It is argued (Petitioner's Brief page 19) that although the car corporation is not a common carrier or subject to regulation as such, it should not be required to carry out the terms of its lease to El Dorado

Company of tank cars because, as observed, "transportation" as defined in the Act, includes "cars", etc. The argument in petitioner's behalf is a superficial reliance upon words without any regard to the substance of the Act, which dealt only with articles in use in interstate movement of freight. "Cars" in the abstract and not in use by carriers in transportation, are clearly not covered by the cited definition.

3.

THE MILEAGE ALLOWANCE AS FIXED BY THE PUBLISHED TARIFFS AND PAID BY THE CARRIERS WAS LAWFUL AND MUST BE ACCEPTED BY THE COURTS AS JUST AND REASONABLE UNTIL THE INTERSTATE COMMERCE COMMISSION HAS HELD OTHERWISE, OR ORDERED MODIFICATION THEREOF.

The carriers over whose lines the leased tank cars moved were and are subject to the Interstate Commerce Act. Under paragraph (11), Section 1 of said Act (49 U. S. C. A.), every carrier subject to the Act is required

> "* * * to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful".

Paragraph (13) of Section 1 authorizes the Commission

> "* * * by general or special orders to require all carriers by railroad subject to this chapter, * * *

to file with it from time to time their rules and regulations with respect to car service, and the commission may in its discretion direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of this chapter relating thereto.".

Under the provisions of paragraph (14) of the same Section 1, the Commission may

"* * * after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this chapter including compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices".

Paragraph (17) of the same section provides that directions of the Commission as to car service and such matters may be made by and through such agencies as the Commission may appoint for the purpose, and directs that it shall be the duty of all interstate carriers to obey strictly and conform to such orders or directions as may be given by the Commission.

Under Section 15 of Chapter 1 of the Interstate Commerce Act the Commission is empowered to determine and prescribe rates, classifications, etc., for interstate transportation and paragraph (13) of Section 15 provides for the allowance for services or

acilities furnished by the shipper in the following anguage:

"(13) *Allowance for service or facilities furnished by shipper.* If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Under the provisions of Section 15, paragraph (1), 9 U. S. C. A. (Chapter 1, page 402), the Commission was empowered to determine and prescribe rates, classifications etc., and after a hearing, either upon complaint made as provided in Section 13 or on its own initiative, to order discontinuance or modification of any rate, fare or charge whatsoever put into effect by carriers and included in the published tariffs.

The "charges and allowances" for providing carriers with cars and other instrumentalities are required by Section 1, paragraph (6), of the Interstate Commerce Act as amended in 1906, to be fixed and

stated in the filed and published tariffs of the carriers.

(49 U. S. C. A., Chap. 1, Sec. 6, par. (1).)

The purpose of the fixing, filing and publication of such charges is to give public notice thereof so as to insure uniformity and make them available to all shippers. Any shipper, consignee or carrier is privileged to complain of any tariff, allowance or rule so filed and published in the tariffs and the Interstate Commerce Commission under the above cited provisions of the Interstate Commerce Act was privileged on its own initiative to investigate and terminate, suspend or modify any tariff rate, rule or regulation included in the published tariffs. The evidence does not show that the mileage allowance paid to the car corporations by the carriers for the furnishing of the tank cars with which this action is concerned was ever made the subject of complaint by anyone whatsoever or drawn in question up to the date of trial of the present action; and since the Interstate Commerce Commission is charged with the duty of determining the reasonableness and propriety of such allowances a litigant must produce an order from the Commission condemning the practice before he can be heard to complain in the Courts. (*Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 247, 257.) The Interstate Commerce Commission though fully authorized to investigate, suspend or modify such car mileage allowances either on complaint or on its own initiative has never made any order in that behalf. In its answer in the District Court, and in its brief

in this Court, petitioner has cited an order of the Interstate Commerce Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars", decided July 2, 1934. (201 I. C. C. p. 323.) Petitioner does not cite this order or the Commission's statement of facts upon which the order was based, as an authoritative ruling by the Commission, but has quoted from it excerpts indicating, as petitioner contends, that the views of the Commission are opposed to the payment of the car mileage allowances by carriers in excess of the cost of the cars to the suppliers. The sections of the Interstate Commerce Act hereinbefore quoted show that the Commission may act after investigation, but that its action must be evidenced by orders, rules or regulations to which all carriers must conform. Its action is reflected in such orders, but may not be determined by inferences or informal statements.

4.

COMMISSION'S ORDER IN RESPECT TO USE OF PRIVATELY OWNED REFRIGERATOR CARS NOT APPLICABLE TO THIS CASE.

Counsel for the petitioner in their brief in this Court apparently concede that the findings of the Commission in the above mentioned proceeding were confined to practices in connection with the use of privately owned refrigerator cars, and that the investigation itself was thus limited. But the Commission definitely limited its action to privately owned refrig-

erator cars as distinguished from other types of cars. The purpose and scope of the investigation are set out in the opening pages of the report. (R. 52.) Primarily the investigation was limited, as the title of the report shows, to the use of refrigerator cars. As stated in the report the Commission of its own motion instituted an inquiry designated as Ex parte 104, "Practices of Carriers Affecting Operating Revenues and Expenses". In referring to the subject of tank cars the Commission said (R. 138):

> "The carriers do not hold themselves out to furnish tank cars to shippers and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material although in isolated instances a few may be furnished to shippers".

Continuing on this subject the Commission said of the evidence before it,

> "That is not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars attend the use of private tank cars". (R. 139.)

In its summary and conclusions the Commission quotes Section 15 (13) of the Interstate Commerce Act with the statement that said paragraph contemplates that a carrier may use instrumentalities furnished by the owner of property transported and may pay therefor, and that "the only restriction on the payment to the shipper is that it shall be no more

than is just and reasonable". After reviewing the abuses attendant upon the use of privately owned refrigerator cars, to the exclusion of those owned by the carriers, and the payment by the carriers of mileage on such private cars by the carriers, the Commission states (R. 159): "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars".

Thereupon an order was entered dismissing the ex parte proceeding and ordering the carriers to cancel the schedules covering mileage allowances applicable to the use of refrigerator cars. That the Commission designed that its order should be applicable only to refrigerator cars is shown both by the express limitations above quoted and by the dismissal of Ex parte No. 104 covering the investigation of private cars other than refrigerator cars. In the face of the statement of the Commission that the evidence was "not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars, attend the use of private tank cars" (R. 139), the Commission could not, as it clearly did not, pass judgment upon the question of mileage paid for the use of privately owned tank cars.

A further answer to the contention set out at page 33 of petitioner's brief, that the principles enunciated by the Commission in the refrigerator car case, are

applicable to all types of private cars, is contained in the Commission's findings. After showing that the interstate carriers were in a position to furnish adequate refrigerator cars from those owned or controlled by the carriers, the Commission states:

> "The carriers do not hold themselves out to furnish tank cars to shippers, and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material, although in isolated instances a few may be furnished to shippers." (R. 138.)

This statement is strictly in accordance with the testimony in this case. (R. 163, 167.) To the extent that the carriers had refrigerator cars available for the service of shippers, such cars of the carriers would be supplanted by privately owned refrigerator cars furnished by the shippers, and the mileage paid thereon for such car service would be unnecessary. On the showing before the Commission in the refrigerator car case that such mileage payments resulted in a profit to the shippers, those shippers would have an advantage over shippers using cars belonging to the carriers, and at the same time the carriers would have reduced their earnings by the amounts so paid, unnecessarily, for the use of refrigerator cars, which the carriers themselves could have furnished. The admitted fact that the carriers did not hold themselves out to furnish and in fact did not have tank cars for the transportation of vegetable oils furnishes a very good reason for the holding of the Circuit Court of

Appeals that the decision in the refrigerator car case is not applicable to the use of tank cars. Furthermore, in that proceeding the Commission stated that the evidence as to the practice in relation to tank cars "was not comprehensive enough to warrant any action on the part of the Commission". The order in the case was limited, as before stated, to privately owned refrigerator cars. In these facts there is, we believe a sufficient answer to the contention reserved in petitioner's brief that the conclusions of the Circuit Court "are wholly irreconcilable with the conclusions of the Commission, and that in effect the court has overruled the Commission".

At pages 30 and following of their brief, counsel for petitioner have set forth excerpts from the findings of the Commission in the refrigerator car matter as indicating that the payment by carriers of mileage allowances for the use of refrigerator cars in excess of the cost of the service constituted a benefit or concession to the shippers using such cars. As shown by their context, these statements refer only to refrigerator cars with which alone the proceeding was concerned. If, as counsel urge, though contrary to the statements of the Commission, these findings of the Commission were intended to apply to the use of tank cars, it does not argue in favor of petitioner's contention that the Commission intended to prohibit the payment of such mileage allowances for the furnishing of tank cars. To the contrary, it would clearly indicate that with all the facts and the existence of the claimed abuses before it, the Commission deliberately

excluded the schedules providing mileage allowances for the furnishing of tank cars from its order of cancellation. (R. 162.)

Extrinsic evidence of the intention of the Commission not to disturb the practice, which had continued over a period of many years, on the part of the carriers to pay a mileage allowance of 1½¢ per mile for the furnishing of tank cars, is supplied by the action of the Commission in several proceedings where the matter of such mileage allowance for tank cars was directly involved and decided. The practice of furnishing private tank cars by shippers, after the Interstate Commerce Act was amended in 1906, was recognized by the Commission in 1910 in *Proctor & Gamble Co. v. Cincinnati H. & D. Ry. Co. et al.*, 19 I. C. C. R. 556. In 1917 Congress enacted provisions to control the practice and, among other things authorized the Commission to make an investigation concerning the operation of private cars over the lines of interstate railroad carriers. Following a very full investigation, the Commission rendered a decision in the nature of a report on July 31, 1918, which was entitled *"In the Matter of Private Cars"*, 50 I. C. C. 652. The hearing involved every phase of the supplying of cars to carriers by shippers. The Commission decided that such supply by the shippers was advantageous to the movement of interstate commerce and that the method of compensating the shipper-suppliers was by a uniform rate per mile as published in the tariffs. In its conclusions the Commission ordered that shippers should be permitted to continue to obtain their cars to transport their shipments by lease from suppliers other

than carriers; that the payments should be made by carriers on the basis of the loaded and empty mileage; that such mileage should be computed on the basis of distance tables and that the then current rate of ¾¢ per mile for the use of tank cars should be increased to 1¢ per mile. (50 I. C. C. R. 709.) At a later date, and in another proceeding, the mileage rate was ordered increased by the Commission to 1½¢ per mile, which rate was effective throughout the period involved in the present action. *"In the Matter of Private Cars"* the Commission expressly referred to the practice stated to be then some twenty years old, under which shippers having leased tank cars from car owners, employed them in the transportation of their own products, and received from the carriers said mileage allowances. The advantages accruing to the shippers as well as the carriers from this practice were fully explained in the Commission's report. But notwithstanding any advantages thus secured by the shipper-supplier, the Commission made the orders above mentioned authorizing the continuance of the payments, and went so far as to increase the car mileage allowance to be paid by the carriers. This, like the subsequent order increasing the mileage allowance to 1½¢ per mile, was a definite order of the Commission made under the authority conferred upon it by the Interstate Commerce Act. In so far as it applied to tank cars it was not in any way affected by the later order of the Commission in *Use of Privately Owned Refrigerator Cars*. Nor has it been set aside or modified by any other order of the Commission. It is therefore effective as to all carriers and all shippers.

Obviously what is authorized by the published tariffs cannot come within the prohibitions of the Elkins Act.

The indictment against a refrigerator car company cited at page 18 of petitioner's brief was based on the charge that the agreement there under review was only a device or cloak to cover a rebate. This case presents no such situation. Petitioner pleaded the car lease agreement in its answer as a fair and legal agreement made in the ordinary course of business.

Without claiming that the mileage allowance provision of the tariffs was set aside or suspended by the Commission, petitioner contends, and that is its only contention, that it should be relieved of its obligations under the car lease agreement from paying to the El Dorado Company the mileage so received. No carrier and no other shipper has ever complained of the mileage allowance, nor has the Interstate Commerce Commission ever suspended, or questioned the propriety of, such mileage allowance on tank cars.

5.

ALL CARRIERS ARE BOUND TO CONFORM TO THE MILEAGE ALLOWANCES STATED IN THE PUBLISHED TARIFFS AND ARE NOT PERMITTED TO PAY FOR THE FURNISHING OF SUCH CARS EITHER MORE OR LESS THAN THE ALLOWANCES PROVIDED IN SAID TARIFFS.

It is fundamental that uniformity of transportation charges was the main objective of the Interstate Commerce Act, and of all amendatory and supplemental acts. Discrimination by the carriers in any form as between shippers is prohibited. This is conceded in

effect in petitioner's brief. Departure from the published tariff rates would work for discrimination and the payment of either a greater or a smaller amount for car service than as provided in the published schedule of car mileage allowances necessarily would have the same effect. Congress therefore provided in the Elkins Act in 1903 for uniformity by making it a crime for a carrier to deviate from its published schedules. And the Hepburn Act in 1906 increased the penalty for a deviation from the tariff schedules. It was therein provided:

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under section 41, 42, or 43 shall be conclusively deemed to be the legal rate *and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section.*"
>
> (Title 49 U. S. C. A. section 41.)

The tariff provisions for the payment of mileage allowances for the furnishing of cars were stipulated on the trial and are set out at pages 192 to 197 inclusive of the record. There was no change as to the mileage rate paid by the carriers during the period here involved.

During the same period the filed and published tariffs of all of the railroad lines operating out of San Francisco Bay Area, provided fixed tariffs for the transportation of such loaded tank cars from re-

spondent's plant on San Francisco Bay to all points east. On all such car movements the carriers received the full rate provided to be paid according to their tariffs, and the only mileage allowance paid by any carrier was paid to the car corporation, and at the rate of 1½¢ per mile strictly as provided in the said tariffs. (R. 175.) The carriers were not called upon to pay more, and they could not have paid less without being guilty of a prohibited departure from their tariffs. This follows necessarily because the rule as to car mileage was a part of the published tariffs, and could not be departed from by either carriers or shippers.

Davis v. Henderson, 266 U. S. 92;
Southern Railway Co. v. Prescott, 240 U. S. 632;
Davis v. Cornwell, 264 U. S. 560.

Upon the premise that the payment of the car mileage allowance to petitioner and by it to the respondent, in accordance with the written agreement of September 28, 1933, would result in a "profit" to the El Dorado Company, it is urged in petitioner's brief that the El Dorado Company would be enabled to transport its products in the leased tank cars at a lower rate than that paid by other shippers. It was stipulated in the District Court, and so testified in petitioner's behalf, that the full freight provided to be paid for transporting said cars was paid according to the applicable tariffs, and that the only allowance paid by the carriers for the furnishing of said cars was that likewise provided in the tariffs. (R. 174-175.) Neither

petitioner nor respondent paid for the transportation of said cars. As testified without conflict, respondent sold and shipped its oil in the tank cars at a price "f. o. b. cars" at respondent's plant in Berkeley. Petitioner had nothing to do with the routing of the cars, which was naturally within the control of the consignee. The carriers had no connection with the respondent or its consignees, and no connection with petitioner except in the adjustment and payment of stipulated mileage allowances according to the published tariffs. (R. 175.) There was no evidence and no claim that any of the carriers had knowledge of the existence of the agreement between respondent and petitioner. But if, as petitioner argues, the payment of the car mileage so received by petitioner, to the El Dorado Company according to the agreement of September 28, 1933, should result in an advantage to respondent it does not follow that the other shippers using cars leased from petitioner did not enjoy the same advantage. There was no evidence to show but that all shippers similarly situated received the same treatment. Regardless of this, however, it would be impracticable, even if it were possible, for the carriers to determine whether payments made in the way of mileage allowances in accordance with the published tariffs would result in a profit or loss to car lessees. Nor could they, having so determined, modify their mileage payments accordingly without departing from the rates provided in their published tariffs and to that extent violating the provisions of the Elkins Act.

Under the tariffs the carriers were authorized to pay to petitioner, as the recorded car owner, accord-

ing to the car markings, the mileage allowance of 1½¢ per mile. They paid that and nothing more as compensation for the furnishing of the tank cars. The consignee paid the full freight rate as provided in the published tariffs. There was therefore no rebate and no discrimination, and petitioner became rightly possessed of the money and was obligated under the terms of the contract sued upon to pay it to respondent who actually furnished the cars to the railroads. It is of no legal importance that such payment might result in a profit or advantage to respondent. As was said by Mr. Justice Holmes in an opinion in a case also involving allowances paid by interstate carriers:

> "The law does not attempt to equalize fortune opportunities or ability."
>
> (*I. C. C. v. Diffenbaugh*, 222 U. S. 42, 46.)

In advancing the argument that it could not pay to respondent, in accordance with the agreement, the mileage allowances so received from the carriers except at the peril of prosecution for violation of the Elkins Act, the car corporation loses sight of the fact that the carriers in every instance received the full rate provided to be paid under the applicable tariffs and that the moneys paid to the car corporation as mileage allowances were properly so paid according to the tariffs. The test to be applied in determining whether the section was violated is whether the terms of the statute include the act committed. There could not be conformance with the published tariffs and at the same time a violation of the cited provisions of the Elkins Act.

The contention of the car corporation that the carriers should not pay mileage allowances in excess of the car cost to the furnishers of the cars is based in part upon the quoted statements of the Commission in the investigation involving the use of refrigerator cars, and in part upon the assumption that the shipper paid, and the carriers received, less than the published tariff rate. This assumption is contrary to the stipulated facts. We have shown that under the provisions of the Interstate Commerce Act carriers may legally pay to shippers compensation in the form of mileage allowances for the furnishing of tank cars or other facilities. In the published tariffs no distinction is made between a shipper-furnisher and an owner-furnisher of tank cars. The mileage allowances provided in the tariffs to be paid were not limited to the cost or expense of furnishing the car but were fixed in accordance with the definite orders of the Commission at the flat rate of 1½¢ computed upon the mileage, Petitioner's argument seems to proceed on the theory that the carriers instead of paying the car mileage allowance uniformly according to the published tariffs should determine for every tank car supplied the exact cost to the supplier and limit the payment of the allowance accordingly. This would disregard the statutory requirement of uniformity and subject the carrier to a fine for each departure from the published tariff. Such a construction of the Act would require the carriers to make innumerable investigations as to the cost to the car owners or shippers of tank cars furnished by them for transportation and apart from other considerations would open

the door to all manner of discrimination prohibited by the Act, and which would result from the variable treatments of the items of cost. The Act clearly contemplated no such procedure.

In their argument on this branch of the case counsel for petitioner have taken exception to the statement in the opinion of the Circuit Court of Appeals that the mileage rates provided in the tariffs to be paid are based upon averages which assume that certain shipper-suppliers might make a profit, and that such profit does not constitute a rebate prohibited by the Act. The statement that the rates are based upon averages, etc., is abundantly supported by the findings of the Interstate Commerce Commission in *"Use of Privately Owned Refrigerator Cars"*, and in fact by the excerpts quoted therefrom in petitioner's brief. The matter of cost and profit to the supplier was not directly involved in this case. It was injected by petitioner in the Circuit Court of Appeals in support of its argument that the payment by petitioner, according to its agreement, of the mileage allowance received by it from the carriers for the furnishing of the tank cars would amount to a rebate or discrimination. As we have previously shown, there could be no rebate, and no discrimination under the facts of this case, but in disposing of petitioner's contention the Circuit Court correctly stated that the car corporation "has not established that the cost of supplying the cars is less than the mileage earnings". The Court proceeded to point out that under the terms of the lease the El Dorado Company was required not

only to pay the monthly rentals for the cars, but in addition was subject to the payment of further rentals at the end of the three year period, and was also under additional expense and risk in the use of the cars. (R. 309.) This matter was further commented on by the Court in the order denying a rehearing. The opinion of the Circuit Court of Appeals was strictly correct. In its answer in the District Court petitioner pleaded that the payment by petitioner to respondent in accordance with the agreement of September 28, 1933 was expressly prohibited and enjoined by the provisions of the Elkins Act, and that if petitioner were to pay to respondent any part of the mileage allowance received from the common carriers in excess of the car rental reserved in the agreement, such payment would result in a prohibited rebate, concession or discrimination under the Elkins Act. Petitioner tendered no issue as to the cost of the cars to the El Dorado Company. If the cost or expense of the cars to that company was in the opinion of petitioner material on the question as to whether or not there was a rebate, a discrimination or any other concession prohibited by the Elkins Act, it devolved upon petitioner to show the fact by affirmative evidence. It failed to do so.

The burden of petitioner's argument, which is stated in various forms throughout its brief, is that payment by the car corporation for mileage earnings according to its agreement with the El Dorado Company, would result in the movement by the El Dorado Company of its commodities at a rate less than that

provided in the applicable tariffs. As we have shown, the full freight rate provided by the published tariffs was paid on every movement of the tank cars for account of which the mileage allowance was paid. Moreover those charges were paid by the consignees under their purchases from the El Dorado Company. There was no payment of the freight charges either by the El Dorado Company or the car corporation. The fact, which is admitted, that for the particular period here involved the mileage allowance payable according to the published tariffs was greater than the car rental agreed to be paid by the El Dorado Company, does not establish the contention of the petitioner that the El Dorado Company enjoys any reduction in the published tariff rates—which it did not pay. It only indicates that for that period, or in respect of those particular car movements, the agreement of car lease worked to the advantage of the El Dorado Company. This was purely a profit on the car lease contract, to which no carrier was a party, and not a reduction in the freight rates paid. Inasmuch as the stipulated facts show that there was no underpayment or rebate or concession in the payment of the freight rate fixed by the published tariffs petitioner's argument, which is repeated throughout its brief, that the payment of the mileage allowance as provided in the published tariffs would result in a rebate or concession is founded entirely on the statements of the commission in its discussion in the proceeding *"Use of Privately Owned Refrigerator Cars"* which, as we have shown, was not intended to apply to

tank cars. To the extent that petitioner's argument is based upon the statements of the Court in the *Reichmann* case and *Spencer Kellogg and Sons v. United States,* which are cited in petitioner's brief, the cases themselves present the answer, because, as we shall hereafter show, in both of those cases a portion of the stipulated freight rate was repaid to a shipper, either directly or indirectly, by one actually engaged in transportation.

The Circuit Court of Appeals held that under the Interstate Commerce Act and the published tariffs, the railroad carriers may pay to shippers compensation in the way of allowances for tank cars or other instrumentalities for services furnished by the shippers. The Court's decision is supported by the opinions of this Court in *Interstate Commerce Commission v. Diffenbaugh,* 222 U. S. 42, and *U. S. v. B. & O. Railroad,* 231 U. S. 274, and by the specific provisions in paragraph (13) of Section 15 of the Interstate Commerce Act, for the payment of such allowances to shippers who directly or indirectly furnish cars or other facilities. The Court also held, and the parties to the present action so stipulated that appropriate tariffs providing for the payment of mileage allowances at the rate of 1½¢ per mile were filed and published, and that in accordance with such tariffs, which are sometimes referred to as "Rules", the carriers properly paid to the car corporation the stated mileage allowances for the use of the tank cars under lease to the El Dorado Company. That such payments to the car corporation were in compliance with the

tariffs and otherwise legal is expressly conceded at page 53 of petitioner's brief in this Court. In the absence of any decision holding that the car corporation could not legally pay to the shipper-supplier, its lessee, the mileage allowance so paid in accordance with the published tariffs, the El Dorado Company is entitled to receive such sum admittedly due to it under the terms of the car lease agreement. In substance, this was the decision of the Circuit Court of Appeals.

Except for a repeated reference to certain decisions distinguished by the Court the petitioner does not challenge any of the substantial grounds upon which the decision in the Circuit Court of Appeals proceeded. Petitioner does, however, devote a considerable portion of its brief to criticism of statements of the Circuit Court on some points which were neither necessary nor relevant to the decision. Petitioner's argument on these points proceeds, we believe, upon a misunderstanding of the opinions of the Circuit Court. Contrary to the contention reserved by counsel for petitioner at page 51 of petitioner's brief, the Circuit Court did not hold that under the applicable tariffs the car mileage was payable to the El Dorado Company nor was any such claim advanced by respondent. Nor did the Circuit Court misunderstand the car mileage tariffs or improperly refer to them in some instances as merely "rules". To the contrary the opinion expressly stated (R. 336), that the schedules which in the exhibit are listed as "Rules" are in fact the "tariffs" provided for in paragraph (13) of Section 1 of the Interstate Com-

merce Act and in Section 1 of the Elkins Act. However designated, they provided that the carriers would pay the mileage either to the car owner or to the party who has acquired the car or cars, provided the cars are properly equipped and marked with the assigned reporting marks etc. (R. 196.) The fact that this tariff provided that payment of the allowance would be made either to the car owner or the party who acquired the car clearly contemplated that the payment could be made to a shipper who acquired the cars under lease, at least up to the change in the tariff which became effective after the claims sued upon in this action had matured. All that was necessary according to the tariff and the argument of counsel for the petitioner is that the oil company, the lessee of the cars, should have had its name stenciled or marked upon the cars to entitle it to demand the mileage from the railroads. It does not appear, nor can we conceive of its being possible, that the recording by the lessee in its name of cars of which it was entitled to the exclusive possession and use, would be attended with much difficulty. It was a mere formality upon compliance with which the El Dorado Company would have been entitled to directly collect the mileage earned by the use of its cars rather than have such collection made for its use and benefit by the car corporation.

Exception is also taken to the statement in the opinion of the Circuit Court that the car corporation was the agent of the El Dorado Company in collecting the car mileage allowance, and upon this

premise it is earnestly argued by petitioner that if the payment of the car mileage allowance to the El Dorado Company was illegal that objection could not be overcome by the appointment of the car corporation as the agent of the El Dorado Company. We might agree with the statement as an abstract proposition of law, but petitioner's claim is based upon two fallacies: First the payment of the mileage to the El Dorado Company if the cars were appropriately marked was permissible and therefore not illegal, and secondly the agency referred to in the opinion of the Circuit Court is affirmatively shown by the lease contract of September 28, 1933, which is marked Exhibit "A" and attached to petitioner's answer in the District Court. (R. 20, 26.) The petitioner therein agreed to collect the mileage earned by the cars for the use and benefit of the El Dorado Company. This was clearly an agency.

As a further challenge to the decision of the Circuit Court of Appeals, petitioner takes exception to that portion of the opinion holding that if petitioner was defending against its liability to pay to the El Dorado Company the sums received and retained by it according to the lease contract, it was required to plead that payment in excess of cost of the cars to the El Dorado Company was prohibited, and to show what that cost was. No legitimate exception could be taken to this statement of the law, and petitioner has not seriously questioned it. Petitioner's argument is that the El Dorado Company failed to claim or prove costs additional to the car rental, and that the Circuit Court

assumed the existence of some additional costs. Petitioner is in error in both contentions. Petitioner pleaded the agreement under which the cars were leased as a legitimate business contract. The contract obligated petitioner to collect and pay over to respondent the mileage earned by the leased cars. It collected the money but retained it to its own use and excused its failure to perform on the plea that such payment in excess of the car rentals paid by the El Dorado Company for the cars would be unlawful and was prohibited. It clearly devolved upon petitioner to prove the total cost of the cars to the El Dorado Company and the Circuit Court properly so held. The El Dorado Company was claiming the right, according to the car lease contract, to receive the mileage when and as collected, by the car corporation from the carriers and obviously was not required to prove all of the items of cost attending upon the furnishing by it of the cars, because the contract of lease made no such provision. The contention that the Circuit Court assumed that the El Dorado Company would have some cost or expense in connection with the leased cars is answered by the provisions of the lease contract wherein the El Dorado Company assumed the cost of repairing damage or destruction to the cars on the lessee's tracks, also the replacement of the caps, valves, etc., if lost or broken; also to save the car corporation harmless for loss or damage arising through injuries to persons or property resulting from the El Dorado Company's use of said cars. (R. 25.) As pointed out by the Circuit Court, the El Dorado Company also

assumed the payment of additional rentals if at the expiration of the contract period of three years the empty mileage haul of said cars exceeded the loaded mileage. The Court was entitled to take judicial notice that cars which, as testified by Mr. Barrows of the El Dorado Company, had to be kept clean and otherwise in good condition for the transportation of edible oils would require cleaning, and that the El Dorado Company as the lessee entitled to the exclusive use of the cars would bear the expense of such necessary cleaning.

Petitioner's argument that the theory of the decision of the Circuit Court was at variance with the theory upon which the case was tried, is not only forced but wholly without merit. The decision of the Circuit Court was that the compensation paid to the car corporation for the use of tank cars was that prescribed in the applicable tariffs, and that the claim that payment of such compensation to the El Dorado Company by the car corporation was prohibited by the Elkins Act was unsound. This was the issue tendered in the car corporation's answer and this was the question directly decided and on which the judgment of the District Court was reversed. (R. 339.) The opinion of Judge Denman was "the car corporation admits that it holds $18,532.78 which it should have paid to the El Dorado Company in several monthly payments if its contentions above stated are not sustained and the El Dorado Company agrees as to the amount involved. Having established no ground for retaining these moneys from its principal and for keeping them

for its own use the car corporation owes the El Dorado Company this amount together with interest computed on the several monthly balances making up the total record". (R. 329, 330.) This again was directly responsive to the issue tendered by the car corporation. Comments or arguments of the Court *inter alia* do not constitute the decision and cannot be invoked to support a claim that the Court decided an issue not involved.

Upon the whole case the question before the Circuit Court of Appeals and before the District Court as well was: Should the car corporation be permitted to retain the car mileage paid to it under the terms of the lease contract and in accordance with the provisions of the published tariffs, or should it be required to pay those sums over to the El Dorado Company as the user and furnisher of the tank cars in accordance with the agreement of the parties. If, as petitioner contends, such payment would yield a profit to the El Dorado Company it was a profit resulting from the lease and having nothing to do with transportation. The claim that such payment by the car corporation to the El Dorado Company would enable that company to transport its products at a cost less than that provided in the published tariffs is without foundation in fact. It was shown without conflict at the trial that the El Dorado Company used the said cars in the transportation of its coconut oil that was sold on the basis of a price f.o.b. tank cars at the El Dorado Plant in Berkeley. Accordingly the freight was not paid by the El Dorado Company but by the consignees. It was stipu-

lated that there was no arrangement of any kind between the consignees or the shippers and the carriers, and the claim of the car corporation that the payment of the particular money sued for in this action would constitute a rebate, a discrimination or a concession was too specious to be taken seriously and was therefore not accepted in the Circuit Court. If, as petitioner's brief concedes, the applicable tariffs were valid, and the payment of the mileage allowances to the car corporation was entirely proper and legal according to those tariffs, the car corporation was properly in possession of the money under the terms stated in its agreement of lease and was obligated to pay that money to the El Dorado Company. Otherwise it would have had a profit to which it was not entitled, since it did not furnish the cars to the carriers, and the El Dorado Company would be deprived of the profit to which it is entitled under the terms of the lease contract.

6.

THE CASES CITED BY PETITIONER.

In its brief petitioner has also presented the argument that the decision of the Circuit Court of Appeals is at variance with the decisions of the Courts in cases involving railroad tariffs and mileage allowances. In that connection petitioner has cited *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235, and *Spencer Kellogg and Sons v. U. S.*, 20 Fed. (2d) 459. The decision of the Circuit Court in this case is not

opposed to the decisions of either of the cited cases, and furthermore the issues and the facts of those cases differ in every material respect from those of the instant case. The *Reichmann* case only involved the propriety of a question propounded by the Commission in the course of an investigation it was authorized to make under the provisions of the Act. Nor does the opinion, from which petitioner has quoted, condemn the payment by the car owner of any portion of the mileage allowance except in the particular circumstances shown to exist in that case. The District Court did not there consider the portion of the Elkins Act relied upon by the car corporation in its defense in this action, and under which a deviation by the carrier from its published tariffs was made a criminal offense. The statutory provisions for the furnishing of cars and other instrumentalities by a shipper and for the car supplying tariff now contained in section 1 (13) of the Interstate Commerce Act were not then in existence. The facts of the *Reichmann* case, as stated in the Court's opinion were that Reichmann was the vice president of the Street Company, a car company owning a large number of cars used by the railroads in the transportation of livestock. Reichmann's company made a practice of paying to shippers a portion of the rental received by it from the railroad carriers for the use of the cars, in consideration of the use of those cars by the shipper instead of other cars that could be supplied by the railroads. The Interstate Commerce Commission under the authority conferred upon it by section 2 of the Elkins Act under-

took an investigation of a charge of abuses under the Act and in that investigation called Reichmann as a witness and asked of him what part of the mileage received by his company from the railroads for the use of its cars was paid by Reichmann's company to individual shippers. Reichmann refused to answer, and the question referred to the District Court by the Commission was as to the right of the Commission to insist upon the answer. At the outset of its opinion the District Court said:

> "In considering the question I shall assume, as counsel did at the argument, that an answer by the witness would have disclosed that payments were made by the Street Company to shippers of freight, and with a view to thereby induce such shippers to demand that carriers furnish them with Street's cars for the transportation of their future shipments."

The only question before the Court in the *Reichmann* case was as to the right of the Commission to insist upon an answer to the particular question propounded to the witness. The right of the Commission to pursue the inquiry was held to follow the authority expressly conferred upon the Commission to make the investigation then in progress. The case of *Ellis v. I. C. C.*, supra, had not then been decided.

In discussing the authority of the Commission to insist upon an answer to the particular question the Court reviewed at length the history and purpose of the Interstate Commerce Act, including the Elkins Act. The comments of the Court could not change the

issues before it or extend the decision beyond the facts of the case. *As stated by the Court the car company rented its cars to the railroads. The railroads in turn furnished them, as it did other cars owned by the carriers to the shippers.* To induce shippers to use its cars as distinguished from those owned by the railroads Reichmann's car company paid to the shippers who would demand and use its cars a portion of the mileage or rental received by his company from the railroad carriers. The feature of that case which made the limitations of the Interstate Commerce Act applicable, and the feature that distinguished that case from the present one, was that the private cars were the property of the railroad carriers under the terms of the lease from the Reichmann company and were therefore instrumentalities of the railroads used in transportation. As pointed out by the Court in the portion of the opinion quoted by petitioner in its brief, the shipper received back a portion of the money paid by him as freight in consideration of his use of the particular cars which the carriers had rented from Reichmann's company and incorporated in their transportation facilities. Furthermore and as stated by the Circuit Court at the date of that decision the Hepburn Act and the statutes which are now incorporated in 49 U. S. C. A. Section 15 (13) authorizing the payment by railroad carriers to shippers for any instrumentality directly or indirectly furnished by the shippers were not then incorporated in the Interstate Commerce Act.

The case of *Spencer Kellogg and Sons v. U. S.* also cited in the brief for petitioner, grew out of the fact that Spencer Kellogg and Sons operated a grain elevator at Buffalo which was used to serve the railroad carriers in the transportation of grain from the point of original shipment to the Atlantic Seaboard. The railroads allowed the elevator company for this service 1¢ per bushel, which was included in and as a part of the through rate provided for such transportation in the published tariffs of the railroad carriers. To induce shippers to so route their grain that it would pass through the Spencer Kellogg elevators in its interstate transportation, the Kellogg Corporation allowed a rebate of ½¢ per bushel and provided for payment thereof through a broker in the City of New York. At page 461 of the opinion in the case (20 Fed. (2d)) the Court, speaking of the elevator company, said:

> "This plaintiff in error, in using its elevator for transportation, performed transportation services, and effectuated the through movement of interstate shipments of grain. It was engaged in interstate traffic";

and in the closing paragraphs of the opinion, Id. page 462, the Court also said:

> "The penalty is imposed here, not because it was acting for the carrier, but because it performed a service of transportation, nd gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

Since the elevator was itself an interstate carrier and repaid to the shipper a portion of the compensation received by it for its transportation services, there was a clear violation of the prohibitions of the Elkins Act against rebating. But neither of the parties to the present action was engaged in or concerned in transportation, and the decision of the Court in the *Spencer Kellogg* case and the reasons assigned therefor are wholly without application.

Petitioner next argues that independent of the Hepburn Amendment and prior to its enactment, interstate carriers were permitted to compensate shippers for the furnishing of cars or other services and the decision of this Court in *Mitchell Coal and Coke Company v. Penn. R. R. Co.*, 230 U. S. 247, is cited as authority. In its decision of the cited case, this Court commented on the narrowness of the statutes then in effect and upon the insufficiency of the existing tariffs in respect to the compensation payable by carriers for services rendered. The point made by petitioner is without any bearing in the present case. Admittedly the provisions of the Interstate Commerce Act in effect throughout the period covered by this action, did authorize payment by the carriers to the supplier of tank cars, whether as owner or shipper, of the mileage allowance as set out in the published tariffs. It is wholly immaterial whether the carriers were or were not so authorized prior to the Hepburn Amendment or the 1917 amendments to the Interstate Commerce Act.

The cited case of *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, does not support petitioner's argument. That case involved a "discrimination" coming within the provisions of the Elkins Act. Railroad carriers had as a part of their tariffs made allowances to certain warehouse companies for consolidating, loading and otherwise handling shipments. The favored warehouses received therefrom a financial benefit denied to other warehouses under the tariffs. The Interstate Commerce Commission, after investigation, had issued an order cancelling this feature of the tariffs in a proceeding entitled *Gallagher v. Pennsylvania Railroad Company.* The favored warehouses attacked the validity of this order of cancellation, and the Supreme Court upheld the order on the ground that the railroad carriers were not required to perform the service for which allowance was made to the warehouse companies, and accordingly that the particular tariff worked a discrimination. As before shown, the Commission has not cancelled or questioned the tank car mileage allowance tariffs and respondent is not seeking anything disallowed by the Commission.

United States v. Koenig Coal Co., 270 U. S. 512 and *Armour Packing Co. v. U. S.*, 209 U. S. 56, also cited at page 58 of petitioner's brief are equally inapplicable. *U. S. v. Koenig Coal Co.*, was concerned with an indictment growing out of the fact that the defendant by means of misrepresentation obtained from the railroad companies cars for transportation of its commodities

in excess of the number permitted by the order of the Interstate Commerce Commission. It was held that this constituted a discrimination within the prohibition of the Elkins Act.

Armour Packing Company v. U. S. was concerned with "devices" which might be employed to obviate the law and accomplish rebates, concessions or discriminations. Inasmuch as counsel have not claimed that the agreement sued upon constituted such a device, the *Armour* case would seem to be wholly irrelevant. The packing company was there convicted of demanding and obtaining from an interstate railroad carrier an unlawful concession of 12¢ per hundred pounds from the published tariff rates applicable to the packing company's shipments. The discrimination was accomplished by the use of through ladings covering both inland and ocean transportation. In this manner the rebate was for a time concealed.

The decision of the Circuit Court is not at variance with the views of this Court in any of the cases cited by petitioner or any other cases that our research has discovered. To the contrary, it is in strict accord with all previous decisions where there was a similarity in the issues or the facts. We might properly inject here that this is the first case where a car owner has endeavored to escape performance of its legitimate contract obligations by assumptions contrary to the stipulated facts.

The remaining points in petitioner's brief are either beside the questions before the Court, or have been already fully covered. We shall therefore refrain from

unduly extending this brief to specifically refer to them.

In conclusion, the stipulated facts show that the car corporation and the El Dorado Company (neither being engaged in transportation) entered into an agreement under which the car corporation leased to the El Dorado Company fifty tank cars to be used by the lessee in its business, for which El Dorado Company paid a monthly rental in advance and the car corporation agreed to collect the mileage earned by said cars for the account of the El Dorado Company. In compliance with the provisions of the Interstate Commerce Act the railroad carriers had filed and published traiffs in which the carriers agreed to pay to the furnisher of such tank cars an allowance of 1½¢ computed on a mileage basis. These tariffs and mileage allowances were binding on carriers and shippers until ordered suspended or modified by the Interstate Commerce Commission.

El Dorado Company, as the exclusive user and possessor of said cars under its lease, furnished them to the carriers for the transportation of coconut oil and the carriers received for such transportation the full rates as provided in the published tariffs. As provided in the tariffs and according to conditions therein stated, the carriers paid to the car corporation the mileage allowance of 1½¢ per mile. The car corporation though receiving the moneys lawfully according to the published traiffs has retained to itself $18,532.54 which under the terms of its lease agree-

ment it was obligated to pay to the El Dorado Company.

The defense that such payment is directly prohibited is answered by the statute itself, as we have previously shown because all that was done was in strict conformance with the Act. The argument that the Commission has condemned similar payments by the owners of refrigerator cars and therefore might condemn such payments by petitioner is answered by the orders of the Commission hereinbefore noted wherein the identical mileage allowances to shippers have been approved. It is admitted that the Commission has made no order in the premises or in any manner disqualified these allowances. It is conceded in the brief for petitioner that the mileage allowances as part of the published tariffs are binding upon carriers, shippers and consignees until disaffirmed by action of the Commission and that the Courts are not authorized to change the published rates or tariffs.

The propriety of allowances by carriers to shippers for services rendered or instrumentalities furnished in the transportation of their own commodities, in accordance with filed and published tariffs has been uniformly upheld by the decisions of this Court:

United States v. Baltimore & Ohio Ry. Co., 231 U. S. 274;

Interstate Commerce Comm. v. Diffenbaugh, 222 U. S. 42;

Union Pacific Ry. Co. v. Updike Grain Co., 222 U. S. 215.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, California,
November 29, 1939.

Respectfully submitted,

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